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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210390
Party	Defendant Heapsylon LLC
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Date	07/04/2013
Attachments	motion to dismiss amended pleading - SENSORIA.pdf(274682 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Feel the World, Inc.	)	Opposition No.: 91210390
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Heapsylon LLC	)	
	)	
Defendant	)	
	)	
	)	

MOTION TO DISMISS AMENDED PLEADING

Defendant Heapsylon LLC, ("Defendant" or "Applicant"), through its attorney, Anthony M. Verna III, hereby files this Motion to Dismiss based upon Fed.R.Civ.P. 12(b)(6) for a failure to state a claim against the Petition for Cancellation that Feel the World, Inc. ("Plaintiff" or "Opposer") filed against Defendant's trademark application, U.S. Serial No. 85778259, SENSORIA.

I. Facts

Opposer/Plaintiff Feel the World, Inc. filed a Notice of Opposition on April 25, 2013. Defendant/Applicant Heapsylon LLC filed a Motion to Dismiss on May 30, 2013. Opposer filed an Amended Pleading on June 13, 2013. Applicant is filing this Motion to Dismiss, restating its objections from the previous motion by reference and discussing the Amended Pleading.

II. The Standard of a Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of a complaint. See TBMP Section 503.01 (3d ed. 2011). To survive such a motion, a plaintiff need only allege sufficient factual matter as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Lipton Industries, Inc. v. Ralston Purina Co*., 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). Also see *Young v. AGB Corp*., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02 (3d ed. rev. 2012).

Applicant has already stated the rest of its argument in its previous motion on May 30, 2013 and refers to it by reference. Opposer has not amended its pleading in order to correct its original problems.

III. Plaintiff/Opposer pleads that it does not have priority and, therefore, does not have standing.

Priority is the first step to showing that a plaintiff has standing in order to file a trademark opposition proceeding. In this case, the Opposer has pleaded that it does not have priority since both parties filed 1(b), intent-to-use applications. See paragraphs 1 and 2 of the Notice of Opposition where Opposer states that Applicant filed on November 13, 2012 and Opposer filed on November 14, 2012.

Applicant has already stated the rest of its argument in its previous motion on May 30, 2013 and refers to it by reference. Opposer has not amended its pleading in order to correct its original problems.

Applicant would like to add that in the Amended Pleading that this matter is still at issue. Paragraph 1 of the Amended Pleading sets the date of Applicant's application and Paragraph 2 of the Amended Pleading sets the date of Opposer's application – which is after Applicant's application (both applications are 1(b), intent-to-use applications).

IV. Fraud must be pleaded with specificity under Rule 9(b).

Where allegations of fraud are the claimed ground for cancelling a registration, Rule 9(b) sets forth a heightened pleading standard: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009) (considering the requirement of pleading fraud with particularity in claims of inequitable conduct in patent cases). In *Exergen*, the Federal Circuit explained that "'[t]his means the who, what, when, where, and how' of the alleged fraud." Id., at 1327 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

Applicant has already stated the standard in its previous motion on May 30, 2013 and refers to it by reference. Opposer has not amended its pleading in order to correct its original problems.

1. "On information and belief" is improper

Pleadings of fraud made "on information and belief," (see the duplicate-numbered paragraph 3 in the Notice of Opposition) when there is no allegation of "specific facts upon which the belief is reasonably based" are insufficient. *Exergen Corp. v. Wal-Mart Stores Inc.*, 91 USPQ2d 1656, 1670 (Fed. Cir. 2009) and cases cited therein (discussing when pleading on information and belief under Fed.R.Civ.P. 9(b) is permitted); see also *In Re Bose Corp., 91*

USPQ2d at 1938. Additionally, under USPTO Rule 11.18, the factual basis for a pleading requires either that the pleader know of facts that support the pleading or that evidence showing the factual basis is "likely" to be obtained after a reasonable opportunity for discovery or investigation. Allegations based solely on information and belief raise only the mere possibility that such evidence may be uncovered and do not constitute pleading of fraud with particularity. Thus, to satisfy Rule 9(b), any allegations based on "information and belief" must be accompanied by a statement of facts upon which the belief is founded. See *Exergen Corp.*, 91 USPQ2d at 1670 n. 7, citing *Kowal v. MCI Commc'n Corp*., 16 F.3d 1271, 1279 n. 3 (D.C. Cir. 1994) "('[P]leadings on information and belief [under Rule 9(b)] require an allegation that the necessary information lies within the defendant's control, and . . . such allegations must also be accompanied by a statement of the facts upon which the allegations are based')."

Applicant has already stated the standard in its previous motion on May 30, 2013 and refers to it by reference. Opposer has not amended its pleading in order to correct its original problems.

2. Opposer fails to explain "how" any statement is false.

The Opposer does not state what false statements are made or how those statements are made or to whom. The Applicant did not make any false statements to the USPTO – and that is never even alleged. The Opposer did not plead that the Applicant sold the products in Applicant's application with the mark. The Board gives a wide interpretation as to what is a mistake and as to what is fraud, and the Opposer's pleading allows the reader to interpret. The Opposer must make that statement.

3. The Opposer does not claim when the alleged fraud occurred or who committed the fraud

There is no timeframe mentioned in Opposer's Notice of Opposition. Did the Applicant allegedly commit the fraud before filing the application? After filing the application? During the application? Did the Applicant change its mind? And does the fraud happen when the product is for sale? Before the product is for sale? After the product is for sale? The opposer has plead nothing as to the time in which the alleged fraud actually happened. (And since the Applicant's application was filed under Section 1(b), one can argue that no fraud ever occurred because the goods were not offered at the time of application, so the public had access to no goods.)

4. Opposer Fails to Plead the Requisite Intent

Opposer also has not pleaded the requisite intent to make out a fraud claim. As the Federal Circuit stated in *In Re Bose Corp*., "Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application…There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." 580 F.3d 1240, 1243 (Fed. Cir. 2009) internal citations and quotation marks omitted) (overruling *Medinol v. Neuro Vasx, Inc*., 67 U.S.P.Q.2d 1205, 1209 (TTAB 2003) (holding that "[a] trademark applicant commits fraud in procuring a registration when it makes material representations of fact in its declaration which it knows or should know to be false or misleading")).

Applicant has already stated the standard in its previous motion on May 30, 2013 and refers to it by reference. Opposer has not amended its pleading in order to correct its original problems.

V. Opposer cites no rule or statute supporting sustaining the opposition

Applicant has already stated the standard in its previous motion on May 30, 2013 and refers to it by reference.

Opposer has changed nothing of substance in its Amended Pleading and Applicant refers to its previous motion to show Applicant's objection to this proceeding.

VI. Alleged Fraud is Moot

Any alleged fraud averred in the Amended Pleading is now moot. The Opposer admits this in the pleading.

In (the second) Paragraph labeled number 2 of the Amended Pleading, the Opposer states that "Applicant **used** the mark 'Sensoria' in a stylized/design format on its website (offering products for 'beta') www.heapsylon.com with the federal registration symbol ® during 2013." (Emphasis added.) Notice how this use is in the past tense. Then, in the same paragraph, Opposer states that "Applicant discontinued use of the federal registration symbol." Therefore, the Opposer admits that even if there were fraudulent behavior, that behavior does not exist anymore and this controversy is now moot.

Federal courts have no constitutional power to consider a moot case, which does not present a live controversy. See *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir.

1998) ("The mootness doctrine is derived from the constitutional requirement that federal courts may only decide live cases or controversies.").

"[U]nder the mootness doctrine, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, we must dismiss the case, rather than issue an advisory opinion." *ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004) (internal quotation marks omitted).

Here, the behavior that Opposer avers is fraudulent no longer exists and Opposer even pleads as such. Therefore, Opposer pleads that the controversy – if there ever were one – is moot.

VII. Conclusion

Opposer's Notice of Opposition has several main issues:

- Lack of priority;
- Improper pleading of fraud (there is no specificity);
- Citing no statutes that actually suggest the alleged behavior would cause the Board to be able to cancel the Applicant's application;
- Mootness; and
- The Opposer has not fixed problems related to the original pleading.

For the forgoing reasons, the Board should dismiss this proceeding because the Opposer has not stated a claim upon which relief may be granted, as under Fed R. Civ. P. 12(b)(6).

Respectfully submitted,

Dated: July 5, 2013

/s Anthony M. Verna III
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IN THE TRADEMARK TRIAL AND APPEAL BOARD

Feel the World, Inc. Plaintiff, vs. Heapsylon LLC Defendant	Opposition No.: 91210390

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of July, 2013, a copy of the foregoing Motion was served via First Class Mail, postage prepaid, on the following:

David Mastbaum, Esq.
Law Office of David Mastbaum
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Boulder, CO 80306

Respectfully submitted,

Dated this July 5, 2013

/s Anthony M. Verna III

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